83 - 1551

FILED
MAR 15 1984
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

BROWN BEAR, INC., COMBINED ENTERTAINMENT VENTURES, LTD., HAPPY DAY, INC., and TOM HOLLIS, JR.,

Petitioners,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

ROBERT EUGENE SMITH
Suite 1230
16133 Ventura Boulevard
Encino, California 91436
(213) 981-9421

MOTT V. PLUMMER
305 Campbell Towers
Fourth & York Streets
Newport, Kentucky 41071
(606) 491-0313

The Brief Shop • Legal Printers • (213) 877-8620

QUESTIONS PRESENTED

I. THE KENTUCKY OBSCENITY LAW AS WRITTEN AND ACCORDINGLY APPLIED TO THE PETITIONERS HEREIN: IS REPUGNANT TO THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES; IN THAT IT PRESUMES THAT PRESS MATERIALS WHICH DEPICTS OR DESCRIBES SEXUAL CONDUCT IS PER SE "PATENTLY OFFENSIVE" AND AS SUCH IS NOT IN ACCORD WITH THE STANDARDS FOR JUDGING OBSCENITY AS SET FORTH IN MILLER vs. CALIFORNIA, 413 U.S. 15, (1973).

II. THE KENTUCKY OBSCENITY LAW AS WRITTEN AND APPLIED TO BROWN BEAR, INC., COMBINED ENTERTAINMENT VENTURES, LTD. AND TOM HOLLIS, JR., IS REPUGNANT TO THE FIRST; FIFTH AND FOURTEENTH AMENDMENTS

TO THE UNITED STATES CONSTITUTION FOR FAILURE TO INCROPORATE THE ELEMENT OF SCIENTER IN THE CRIME OF CRIMINAL FACILITATION OF OBSCENITY.

III. THE APPLICATION OF THE KENTUCKY OBSCENITY LAW TO PETITIONERS HEREIN IS REPUGNANT TO THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, IN THAT THE GEOGRAPHICAL COMMUNITY BY WHOSE STANDARDS THE PRESS MATERIALS ARE TO BE JUDGED WAS UNDULY RESTRICTIVE CONSIDERING THE GREATER METROPOLITAN AREA OF CINCINATTI AND NORTHERN KENTUCKY.

IV. THE APPLICATION OF THE KENTUCKY OBSCENITY LAW TO PETITIONERS HEREIN WAS REPUGNANT TO THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THE HIGHLY PREJUDICIAL AND INFLAMMATORY DEFINITION OF THE WORD PRURIENT.

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

October Term 1983

_____

HAPPY DAYS, INC. ; BROWN BEAR, INC.
COMBINED ENTERTAINMENT VENTURES,LTD.,

AND TOM HOLLIS, JR.

PETITIONERS

VS.

COMMONWEALTH OF KENTUCKY

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF KENTUCKY

The Petitioners respectfully pray that a Writ of Certiorari issue to review the Order denying discretionary review entered in the above case by the Supreme Court of Kentucky on December 15, 1983.

OPINION BELOW

The order of the Supreme Court of Kentucky denying discretionary review is not yet reported but is set forth in Appendix A herein. Discretionary review was also denied by the Court of Appeals of the Commonwealth of Kentucky and a copy of said denial is set forth in Appendix B. The order and judgment of the Campbel Circuit Court, of the Commonwealth of Kentucky, affirming the lower Court is attached hereto as Appendix C. The findings of fact and conclusions of Law are attached hereto as Appendix D.

JURISDICTION

The judgment and Order of the Campbell Circuit Court, of the

Commonwealth of Kentucky, affirming the lower Court was entered on April 23, 1983. On appeal, discretionary review of said judgment and order was denied by the Court of Appeals for the Commonwealth of Kentucky on June 28, 1983. Upon application for discretionary review of said denial to the Supreme Court of the Commonwealth of Kentucky, that Court also denied discretionary reviewby Order of December 15, 1983. This Court's jurisdiction is invoked under Title 28, U.S.C. Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the First,Fifth and Fourteenth Amendments to the United States Constitution are set forth in Appendix E hereto.

STATEMENT OF THE CASE

On July 12, 1980, Ken Soward, an officer with the Kentucky State Police, made an application for a search warrant for the premises known as the Cinema X Theatre located in Newport, Campbell County, Kentucky. Two (2) films were seized pursuant to the Search Warrant, and thereafter, the Commonwealth cited the purported projectionist, Larry Varney, with two (2) counts of distribution of obscene matter and also cited the alleged ticket-taker Suzanne Raleigh, with two (2) counts of distributing obscene matter. Additionally Brown Bear, Inc., Happy Day, Inc, Combined Entertainment Ventures, Ltd. and Tom Hollis, Jr. were charged with criminal facilitation

in connection with distribution of obscene matter.

Prior to the commencement of the trial on April 10, 1981, the Commonwealth of Kentucky moved to dismiss the charges against Varney and Raleight, and went to trial on two (2) films. The trial commenced on April 10, 1981 and was concluded on Tuesday, April 14, 1981 when all defendants were found "Guilty".

The sentence of the Court as the Happy Day, Inc. was $10;000 fine; Brown Bear, Inc. a $5,000 fine; Combined Entertainment Ventures, Ltd. a fine of $5,000 and Tom Hollis, Jr. 90 days in jail and sentence was stayed pending appeal.

An appeal was taken and discretion-

was denied by both the Court of Appeals and the Supreme Court.

Petitioners seek review from the Supreme Court of Kentucky's denial of discretionary review.

REASONS FOR GRANTING THE WRIT

I.

THE KENTUCKY OBSCENITY LAW AS WRITTEN AND ACCORDINGLY APPLIED TO THE PETITIONERS HEREIN, IS REPUGNANT TO THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, IN THAT IT PRESUMES THAT PRESS MATERIALS WHICH DEPICTS OR DESCRIBES SEXUAL CONDUCT IS PER SE "PATENTLY OFFENSIVE" AND AS SUCH IS NOT IN ACCORD WITH THE STANDARDS FOR JUDGING OBSCENITY SET FORTH BY THIS COURT IN MILLER VS. CALIFORNIA, 413 U.S. 15, (1973).

The Commonwealth of Kentucky enacted a new obscenity law several years after the decision of this Court in Miller vs. Calif. 413 U.S. 15 (1973).

The new statute KRS 531.010 et seq. attempts to utililize the standards for judging obscenity fashioned by this Court, but does so rather imperfectly.

The part of the test established by the legislature of the Commonwealth of Kentucky reads in pertinent part as follows:

"(b) The matter depicts or describes the sexual conduct in a patently offensive way;"

This Court in fashioning standards for determining the test for obscenity used the following words in Miller vs. California 413 U.S. Supra at page 24:

"(b) Whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law."

The essential difference between the Miller standard and that imposed by the legislature of the Commonwealth of Kentucky

is that Miller requires that the fact finder analyze the challenged press materials to determine whether the sexual conduct depicted or described is done so in a "patently offensive way", and the definitional standards imposed by the Commonwealth of Kentucky suggest that if the work describes sexual conduct, it is thus per se patently offensive.

The Commonwealth of Kentucky obscenity law is thus repugnant to the First, Fifth and fourteenth Amendments to the Constitution in that KRS 531.010 (4) establishes an impermissive presumption and takes from the fact finder the task for determing whether the

sexual conduct was depicted or described in a patently offensive way. In so doing, the legislature encroached upon the exclusive perogatives of the jury and thus reached conduct arguably protected under the First Amendment.

The Supreme Court of the the state of Rhode Island in dealing with a similar issue was compelled to observe in finding the state statute unconstitutional, as follows in D. & J. Enterprises, Inc., vs. Michaelson, 401 A.2d. 440 (R.I. - 1979)

> "It (the state) creates a per se rule rather than allowing the trier

of fact to measure an individual work against "contemporary community standards' in order to reach a specific conclusion in a particular matter."

Recently the Ninth Circuit in the case of J. R. Distributors, Inc., vs. Eikenberry, et al., 725 F. 2d 482 (1954) warned of the dangers of deviation from this Court's three-part test in Miller and held a state of Washington Obscenity Law unconstitution.

The Court in it's opinion stated:

"The judicial effort to find an acceptable definition for obscenity constitutes one of the longest and most arduous struggles in the history of American jurisprudence. After employing several different definitions, the Supreme Court finally adopted a three-part

test in Miller v. California, 413 U.S. 15 (1973). Under the Miller test, speech is obscene and thus not protected under the first amendment if three guidelines are satisfied: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, polital or scientific value.
413 U.S. at 24 (citations omitted).

Despite the continued adherence to the Miller test, few would disagree with the view that only a "dim and uncertain line" separates obscenity from constitutionally protected speech. Bantam Books, Inc. v. Sullivan,

372 U.S. 58, 66 (1963). As Justices Brennan, Stewart and Marshall remarked, "one cannot say with certainty that material is obscene until at least five members of [the Supreme] Court, applying inevitably obscure standards, have pronounced it so." Jenkins v. Georgia, 418 U.S. 153, 164-65 (1974) (Brennan, Stewart and Marshall, JJ., concurring), quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 92 (1973) (Brennan, J., dissenting). Yet, on one side of the Miller line, speech is entitled to the highest form of protection afforded by our laws and constitution, while, on the other side, speech that is held obscene may be punished as a crime.

Because4 of the inevitable uncertainty as to where the line will be drawn and the critical importance of not interferring with constitutionally protected speech, courts have insisted that the Miller guidelines be

followed without deviation. See, e.g. Hamling v. United States, 418 U.S. 87, 114 (1974) ("Miller . . . was speaking in terms of substantive constitutional law of the First and Fourteenth Amendments . . . [and establishes] a limit beyond which neither legislative draftsmen nor juries may go . . . ."). 7/ When the Miller guidelines were adopted, the Supreme Court emphasized that "[s]tate statutes designed to regulate obscenity must be carefully limited. As a result, we now confine the permissible scope of such regulation to works" that satisfy the three-part test. Miller, 413 U.S. at 23-24 (emphasis added, citation omitted). To assure that protected speech is not impermissibly regulated, then even subtle deviations from the Miller standards must be carefully examined. (Emphasis supplied)

Accordingly, because the essential element of the definition of obscenity in the Commonwealth

of Kentucky's anti-pornography statutes unconstitutionally infringes on protection expression, the statute should be declared invalid on overbreadth and due process grounds.

II

THE KENTUCKY OBSCENITY LAW AS WRITTEN AND APPLIED TO BROWN BEAR, INC., COMBINED ENTERTAINMENT VENTURES, LTD. AND TOM HOLLIS, JR., IS REPUGNANT TO THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION FOR FAILURE TO INCORPORATE THE ELEMENT OF SCIENTER IN THE CRIME OF CRIMINAL FACILITATION OF OBSCENITY.

The Kentucky obscenity law which allows the incorporation of the Kentucky criminal facilitation law permits a person to be punished without giving such person adequate warning of the nature of the conduct that is to be condemned by the law. It further permits punishment for constitutionally mandated requirement of scienter.

K.R.S. Sec. 506,080 provides in pertinent part:

> "(a) a person is guilty of criminal facilitation when, acting with

> knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime."

Thus it can be seen that if XYZ commits the offense of violating the Commonwealth obscenity laws, then any one providing means or an opportunity to commit the crime is guilty of "criminal facilitation". This would conceiveably include the public utility compainies, lawyers, accountants, a bookkeper, landlords, janitor services who furnish any services to XYZ, which in some way was of aid in his offending criminal conduct. This kind of law, when viewed

against the First Amendment is overly broad and is further void for vagueness.

The sanction of criminal punishment can thus be meted out, as it was here, to those who had not seen the films offered at the Cinema X, had not procured the films offered at the Cinema X and who performed services unconnected with the exhibition of films contended to be obscene.

This vagueness is further compounded by the absence of the constitutionally mandated element of scienter first acknowledged by this Court in Smith v. California, 361 U.S. 147, 153-154, to be a requirement of any State obscenity statute. This Court in Hamling vs. United

States 418 U.S. 87 (1974) approved a definition of scienter that reads in pertinent as follows:

> " It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." Id. at 123.

The essence of the statute permits punishment to all who assist the pornographer exhibit it's wares without regard it's wares without6 regard to whether their knowledge of the business of the exhibitor was generally adult film fare. If One hundred (100) films exhibited in a year are not obscene and two (2) films are, then that would be sufficient, as in the case at bar to enforce

criminal sanctions without proving scienter as to the offending film fare.

The criminal facilitation statue uses the word "knowingly" to impose a standard for determing guilt. The "knowingly" is a verb modifying conduct which provides a means or opportunity to commit a crime. This word is not used in the sense of scienter as otherwise used in obscenity statutes, and consistent with the Hamling case previously cited.

As such the crime of criminal facilitation applied to an obscenity prosecution is clearly void for vagueness as that doctrine has been judicially interpreted by this Court.

Generally, the constitutionality of a statutory provision under attack on void-for-vagueness grounds mu7st be determined strictly on the basis of the statute's application to the particular facts at hand. United States v. Powell, 423 U.S. 87, 92, S. Ct. 316, 46 L. Ed. 2d 228 (1975); United States v. Maxurie, 419 U.S. 544, 550, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1975); United states v. National Dairy Corp., 372 U.S. 29, 32-33, 83 S. Ct. 549, 9 L. Ed. 2d 561 (1963). However, where the statute appears to intrude upon fundamental constitutional liberties, particularly the First Amendment guarantees of free speech and assembly, the statute is to be tested for

vagueness on its face. Smith v. Gaguen, 415 U.S. 566, 573, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974); Winter v. New York, 333 U.S. 507, 509, 68 S. Ct. 665, 92 L. Ed. 840 (1948).

> "(T)here is (in these cases) the danger that the state will get away with more inhibitory reregulation than it has a constitutional right to impose, because persons at the fringes of amenability to regulation will rather obey then run the risk of erroneous constitutional judgment."
> Note, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960).

Recently this Court again addressed the issue of the vagueness question in criminal statutes in the case of Kolender, et al. v. Lawson, ____U.S. ____, 75 L. Ed. 903(decided May 2, 1983), where Justice O'Conner speaking for

The Court observed in pertinent part as follows:

> "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is probhibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

No one should be required at peril of life, liberty or property, to speculate as to the meaning of a penal statute. Lanzetta v. New Jersey, 306 U.S. 451 (1939). The lack of a scienter requirement and the lack of standards to limit those who innocently assist an exhibitor of adult film fare without knowing the character, content and nature of the films distributed makes this law as applied to the Petitioners herein violative of First and Fifth Amendment rights.

III.

THE APPLICATION OF THE KENTUCKY OBSCENITY LAW TO PETITIONERS IS REPUGNANT TO THE FIRST, FIFTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES; IN THAT GEOGRAPHICAL COMMUNITY BY WHOSE STANDARDS THE PRESS MATERIALS ARE TO BE WAS UNDULY RESTRICTIVE CONSIDERING THE GREATER METROPOLITAN AREA OF CINCINATTI AND NORTHERN KENTUCKY¿

The Commonwealth of Kentucky Obscenity Statute does not define or establish what the parameters are of the community by which the fact finder is to determine the prurience and patent offensiveness of press material depicting sexual conduct. The appellate Courts of the Commonwealth of Kentucky have not authoritatively construed the appropriate geographical limits that a jury may consider in assessing the community standards issues of the Miller obscenity test.

Accordingly, a potential exhibitor has no way of knowing, in advance whether his conduct is to be judged by the community standards as applied statewide, or the City of Newport, or Northern Kentucky or the Greater Metropolitan Area of Cincinatti. This would clearly implicate vagueness problems addressed in the previous argument herein.

The City of Cincinatti has within its limits approximately 385,451 people. Kenton County, contingous to Cincinatti has approximately 137,058 people and Campbell County, also contiguous to Cincinatti as well as Kenton County has only approximately 83,317 people. The people live and work in the greater Cincinatti area which

includes Northern Kentucky where Campbell County, and conversely the Cinema X Theatre is located. By the rulings of the trial Court the Jury was only permitted to apply the standards of Campbell County, notwithstanding the fact that Cincinatti, Ohio is just accross the river, and Kenton County is separated from Campbell County by an artificial boundry line. There are approximately 605,000 people in the area and Campbell County comprises only 14% of that number.

Further, the Cincinatti Airport is located in Northern Kentucky, Cincinatti T.V. and radio stations regularly are broadcast and received in Campbell County, as well as newspapers and billboard advertising.

Miller vs. California, supra, Hambling vs. U.S. Supra and Jenkins vs. Georgia 418 U.S. 154 (1974) clearly stand for the proposition that a national standard is not to be used in an obscenity prosecution. This Court has approved the use of a statewide standard in Miller, a standard that would include the vicinage from which the jury is drawn, and Jenkins approved the use of an instruction on contemporary community standards which did not delineate any particular geographical community by whose standards the offending press materials could be judged.

Numerous state courts have required as to state legislation, that a statewide standard for the community be employed. Those include Alabama

(Pierce vs. State, 292 Ala. 473, 296 So.2d 218 (1974)); New York, (People vs. Heller, 33 N.Y. 2d 314 - 1974); New Jersey (State vs. Wein 392 A. 2d 607 - 1978) Texas (Berg vs. Texas, 599 S.W. 2d 802 - 1980) and Wisconsin (Court vs. State) 217 N.W. 2d 676 - 1974).

The use and application of the Commonwealth of Kentucky Obscenity Statute without a delineation of any specific geographical boundries to be considered in assaying the "contemporary community standards" or authoritative construction by the Appellate Court when viewed in light of Petitioners' rights under the procedural and substantive requirements of the First and Fifth Amendment.

Accordingly, the statute in the absence of definitive geographical guidelines is void for vagueness

and absence of definitive geographical guidelines is void for vagueness and further impacts on Petitioners rights under the First Amendment.

IV.

THE APPLICATION OF THE KENTUCKY OBSCENITY LAW TO PETITIONERS HEREIN WAS REPUGNANT TO THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THE HIGHLY PREJUDICIAL AND INFLAMMATORY DEFINITION OF THE WORD PRURIENT.

The trial court defined PRURIENT INTEREST to the jury as follows:

> "means a lustful, lascivious, erotic, shameful or morbid interest in sexual conduct."

This Court first defined prurient in Footnote to Roth vs. United States, 354 U.S. 476, (1957) The Court gave a wide

range of dictionary meanings to the word but concluded by reference to the A.L.I Model Penal Code 207.10(2) (Ten. Draft No. 6, 1957), where prurience was limited in it's scope to the terms "shameful and morbid".

The Ninth Circuit in the J.R. Distributors case, supra, held the use of similiar words to that used by the trial judge to be unconstitutional.

The wisdom of that Court should be the ruling of this Honorable Court in finding that the Commonwealth of Kentucky Obscenity Statute to be unconstitutional.

CONCLUSION

The judgment of the Supreme Court for the Commonwealth of Kentucky should be reversed for the reasons set forth in the arguments contained herein.

The statute in question is clearly unconstitutional.

Respectfully submitted,

ROBERT EUGENE SMITH
16133 Ventura Blvd.
Encino, Ca. 91436
(213) 981-9421

ATTORNEY FOR PETITIONERS

APPENDIX A

SUPREME COURT OF KENTUCKY

SC 83-SC-570-D

(83-CA-1179-D)

HAPPY DAY, INC., BROWN BEAR, INC., COMBINED ENTERTAINMENT VENTURES, LTD., AND TOM HOLLIS, JR.,

Movant,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

Campbell Circuit Court

81-X-27

ORDER DENYING DISCRETIONARY REVIEW

The motion of Happy Day, Inc., Brown Bear, Inc., Combined Entertainment Ventures, Ltd., and Tom Hollis, Jr. for a review of the decision of the Court of Appeals is denied.

ENTERED: December 15, 1983

/s/ Robert F. Stephens
Chief Justice

APPENDIX B

Commonwealth of Kentucky

Court of Appeals

NO. 83-CA-1179-D

HAPPY DAY, INC., BROWN BEAR, INC., COMBINED ENTERTAINMENT VENTURES, LTD. & TOM HOLLIS, JR.,

MOVANT

v. ON MOTION FOR DISCRETIONARY REVIEW FROM CAMPBELL CIRCUIT COURT

COMMONWEALTH OF KENTUCKY

RESPONDENT

* *

ORDER DENYING DISCRETIONARY REVIEW

BEFORE: REYNOLDS, HOWERTON, and WHITE, JUDGES

The Court, having considered the motion for discretionary review and being otherwise sufficiently advised, ORDERS that it be, and is hereby, DENIED.

ENTERED: 6-28-83

/s/ Charles H. Reynolds
JUDGE, COURT OF APPEALS

APPENDIX C

CAMPBELL CIRCUIT COURT

DIVISION NO. TWO

COMMONWEALTH OF KENTUCKY,)

Plaintiff/Appellee)

-vs-)

BROWN BEAR, INC.)
COMBINED ENTERTAINMENT VENTURES
LTD., HAPPY DAY, INC.)
TOM HOLLIS, JR.,
)

Defendants/Appellants.

NO. 81-X-27

ORDER AND JUDGMENT

FILED
APR 21, 1983
CAMPBELL CIRCUIT CT.
EDWARD J. BLAU, CLERK

This is a motion to reconsider and alter previous findings of fact, conclusions of law and Judgment dated March 9, 1983, which affirmed the Judgment of the District Court.

Although several defendants joined in the motion, particular emphasis is placed

on the defendant, Tom Hollis, Jr., who in the District Court was found guilty of facilitation in the depiction of obscene films.

The corporate co-defendant, Happy Day, Inc., was found guilty of distributing obscene matter; and the two corporate co-defendants, Brown Bear, Inc. and Combined Entertainment Ventures, Ltd., were each found guilty of facilitation.

There was documentary and other evidence at the trial that Tom Hollis, Jr. had performed various services for all of the corporate co-defendants. The thrust of this motion is that the evidence showed only that the services of Tom Hollis, Jr. were legitimate business duties of a bookeeping and accounting nature, unrelated to the commission of depicting obscene matter.

It is recognized that merely doing business with another who is engaged in the commission of an offense does not constitute facilitation; but in the present case, the jury had before it evidence that the subject films were being exhibited in the conduct of operating a motion picture theater. This was a business enterprize, and the jury heard evidence concerning the activities of the appellant, Tom Hollis, Jr., in connection with the many routine day to day necessities of conducting such a business. Whether Tom Hollis, Jr. was performing said functions as a disinterested party concerning the offense and unrelated thereto or whether he was knowingly and willingly a party and principal in the illegal venture was a matter the jury had to decide from the evidence.

Although the said appellant has listed many things he did not do that would tend to disprove he was guilty of facilitation, the jury by its verdict gave more weight to the evidence that linked him with the offense.

IT IS, THEREFORE, ORDERED that appellant's motion is overruled.

/s/ THOMAS F. SCHMORE
JUDGE

I, Edward J. Blau, Clerk of the Campbell Circuit Court, certify that a true and correct copy of the foregoing was mailed this 21st day of April, 1983, to Hon. Justin Verst, Hon. William Wehr, Hon. Mott Plummer, Hon. Robert Eugene Smith, Hon. Steven Megerle and Hon. Richard Slukich.

Edward J. Blau, Clerk

by: /s/ Jean Grim D.C.

APPENDIX D

CAMPBELL CIRCUIT COURT

DIVISION NO. TWO

BROWN BEAR, INC.
COMBINED ENTERTAINMENT VENT. LTD.,
HAPPY DAY, INC. and
TOM HOLLIS, JR.,

Appellants,

-vs-

COMMONWEALTH OF KENTUCKY,

Appellee.

NO. 81-X-27

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

FILED
MAR 9 1983
CAMPBELL CIRCUIT CT.
EDWARD J. BLAU, CLERK

This is a combined appeal by the above named appellants, from a District Court Judgment pursuant to a jury verdict, wherein the appellants were found guilty and sentenced as follows:

Appellant	Offense	Sentence
Happy Day, Inc.	Distribution of Obscene Matter	Fine, $10,000

Appellant	Offense	Sentence
Brown Bear, Inc.	Criminal Facilitation	Fine, $5,000
Combined Ent. Vent. LTD	Criminal Facilitation	Fine, $5,000
Tom Hollis, Jr.	Criminal Facilitation	90 days Jail Fine, $250

The Judgment of the District Court is affirmed.

Appellants advance many grounds in support of their contention that reversible error existed in the proceeding and trial of this case.

FINDINGS OF FACT

1. The appeal by the co-defendants is consolidated into one appeal.

2. The various contentions advanced by the defendants as reversible error include the constiutionality [sic] of the statutes involved, denial of a change of venue, denial of a severance of the

several defendants for trial, denial of a motion to require the Commonwealth to elect to prosecute the corporate defendants either as sham corporations or as legitimate coporations, insufficiency of the criminal complaints, unlawful search and seizure, insufficient evidence, improper designation of geographical community, improper admissions of evidence of a prior conviction, refusal of the trial judge to ask voir dire questions submitted by appellants, improper closing argument by the Commonwealth, refusal of the trial judge to vacate the bench, oppressive subpeona duces tecum issued against the corporate appellants, improper instructions to jury, denial of an oppportunity [sic] to obtain the testimony of the judge who issued the search warrant and

discriminatory prosecution under the obscenity statute.

CONCLUSIONS OF LAW ON THE LEGAL POINTS RAISED IN APPELLANTS' STATEMENT OF APPEAL

1. Appellants put in issue the constitutionality of K.R.S. 531.010 and K.R.S. 531.020. Although the constitution guarantees freedom of speech, the Supreme Court has held that the states may pass laws to prohibit obscenity. Thus, obscenity, is not protected by the freedom of speech amendment. In determining obscenity, K.R.S. 531.010 does not impose standards more severe than those enunciated in Miller vs. California, 415 U.S. 15. The test set out in the Miller case is whether the work appeals to the purient interest, while K.R.S. 531.010 provides that to be obscene the work must predominently appeal to the purient interest. Conduct considered obscene under the Miller guidelines because it appeals to

the purient interest might still be legal under K.R.S. 531.010 because even though it might appeal to the purient interest, it does not predominently appeal to such interest. Therefore, K.R.S. 531 imposes a less severe standard than that set out in Miller. If the matter involved consists of a film, it is not necessary that one charged with facilitation see the film. It is sufficient if knowledge comes from any source. If it were necessary that a person so charged to have previously viewed the film, one could merely refrain from looking at the material and be safe from prosecution regardless of knowledge of the nature and content of the material.

3. In substance, the criminal complaint against Brown Bear, Inc. states that the defendant knowingly facilitated others in the distribution of obscene

matter at the theater, which was named. The address of the theater appeared in the complaint, along with the names of the motion pictures and the dates they were shown. The complaint informs the defendant, who is stated to be the owner of the real estate where the movies were shown and that the defendant knew the character and content of the films, and facilitated by permitting the showing on its property.

The substance of the complaint against Combined Entertainment Ventures, Ltd. is that said defendant facilitated the offense by owning ther personal property used in connection with the operation of the theater, that the defendant knew the nature and content of the films, which were named, and that the facilitation consisted of permitting the films to be shown in the theater on the dates charged.

The criminal complaint against Happy Days, Inc. on its face states in substance that Happy Days, Inc., as the license-holder and operator of the Cinema X Theater, had in its possession the named films and knew of their content and nature and that said defendant was in possession of the material with intention to exhibit it.

The substance of the criminal complaint against Tom Hollis, Jr. is that he facilitated in the exhibition of obscene matter, consisting of the films, giving their titles, and the dates and place where they were shown, and that his part in the facilitation consisted of performing services either as an agent or an offficer [sic] or an employee or any combination of such capacities of the three named corporations. The

complaint further states that said defendant did this knowingly.

With reference to the appellants, Brown Bear, Inc., Combined Entertainment Ventures, Ltd., and Tom Hollis, Jr., all of whom were charged with facilitation, they argue the the scienter requirements have not been met because there has to be personal knowledge that the contents of the films are obscene, and that there has been no evidence that the pictures were actually viewed by Tom Hollis, Jr. or by anyone as agent of the corporate defendants. It is correctly stated that knowledge is a prerequisite, but as hereinbefore stated, a viewing of the films by one accused of facilitation is unnecessary if knowledge has come from any other source. The complaints use the word "knowingly". So far as the complaints are concerned, the use of this word

charges scienter. Hanling vs. US, Supra. It is a question of fact requiring proof whether the defendant, Tom Hollis, Jr. had the necessary knowledge and whether any of the corporate officers, agents or servants had personal knowledge of the nature and contents of said films. That one who facilitates "should have known" is insufficient. The jury was not instructed that it could find guilt on this basis, should have known.

The appellant, Tom Hollis, Jr., takes issue with the sufficiency of the complaint in its statement that his activities were in the capacity either as an agent or officer or employee of the corporations without stating specifically his capacity or for which of the corporations or combination of them he acted. The conjunctive and subjenctive [sic] form of the accusation is considered by

said appellant to be defective. R.Cr.2.02 requires the complaint to contain a written statement of the essential facts constituting the offense charged. In the case of an indictment, which is a form of criminal complaint, it is sufficient if it alleges that the means by which the defendant committed the offense are unknown or that he committed it by one or more alternate specified means. R.Cr.6. Thus, if the accuser doesn't know which of several possible alternatives as to how an offense was committed, but does know that it was committed in one or more of several ways and so alleges, the accusing document is not rendered invalid. In the present case, the defendant, Tom Hollis Jr., is accused of criminal facilitation by acting for the corporate entitles. The exact capacity is not stated, but the essential fact alleged is that

he was acting for the corporations and in any of the alternate capacities listed an offense would be committed. Said appellant could not show that he was misled in the preparation of his defense because of the alternative allegation, especially since the detailed facts concerning capacity more likely would be in the peculiar knowledge of the accused.

Therefore, it is concluded that the several criminal complaints were sufficient under the criminal rules and are not so vague as to prejudice a proper preparation of defenses.

4. The search warrant is legally valid. Appellants assert the police officer who viewed the films and signed the affidavit for a search warrant was prejudiced because he was an officer. Moreover, it is stated that the affidavit of the officer that the films were obscene

is a mere conclusion on his part and that the search warrant procedure lacked the necessary protection of a neutral magistrate.

The district judge viewed the films himself before he signed the search warrant. The officer had seen the film on the 11th day of the month and again on the 12th day of the month. It was on the 12th that the district judge saw the film at the same time as the officer. It is not material that the appellants were charged with exhibiting the films on both the 11th and 12th, the 11th being one day before the district judge himself had seen the film. If the district judge had probable cause to sign the warrant on the basis that he had seen the film on the 12th, it would also give credence to the affidavit of the officer who swore that he had seen the same film on the

11th. The Western Corporation vs. Commonwealth of Kentucky, Ky. 558 SW 2d 605.

5. The district court did not err in refusing to require the Commonwealth to elect whether or not to prosecute on the basis that the involved corporations were sham corporations. They were legally formed and legally existing under the corporate laws of the Commonwealth. As to them, the issue was whether their agents knowingly violated K.R.S. 531.020. Whether or not they were organized and existing solely as a means for an individual to conduct the theater and use their different names and entities for real estate ownership and theater license purposes, the issue concerning their guilt or innocence remains the same, namely, whether their agents knowledgeably violated K.R.S. 531.

6. The Court did not err in denying Tom Hollis, Jr.'s motion for judgment notwithstanding the verdict. The defense was that he was an independent contractor for the corporation Brown Bear, Inc., and as such his activity was limited only to keeping books and doing those things which an ordinary bookkeeper or accountant would do. It was a question of fact for the jury to decide in what capacity he was acting and what he knew about the operation. Either as an independent contractor or as an agent, there was evidence to support the jury's finding that he was knowingly facilitating the commission of an offense.

7. Appellants argue that K.R.S. 531 renders illegal activity that otherwise would not be illegal because it would be under the protection of the first constitutional amendment. Counsel

contends the statute makes such activity illegal solely because the exhibition or distribution happens to be a commercial exploitation. K.R.S. 531 makes no distinction concerning exploitation, therefore, this objection to the statute is considered not well taken.

8. Appellants contend the trial court's failure to instruct the jury that in determining community standards that such standards must be applied in accordance with the understanding of tolerance of the average person in the community, constituted reversible error. The jury was properly instructed that they must determine what the community standards are and in so doing it must consider the adult community as a whole, educated and uneducated, religious and irreligious adults from all walks of life. This instruction convered the spectrum from

the most prudish to the most tolerant. Further detail would be unnecessary and unwarranted.

9. Evidence of prior convictions are generally inadmissible for reasons too well settled to require repetition. However, when considering such evidence in this case, it is concluded that the admission into evidence of a former recent conviction of Brown Bear, Inc. of exhibiting obscene material was relevant as to Brown Bear, Inc. to show plan or scheme and was relevant to the co-defendants who were charged with facilitation on the question whether they had knowledge of the nature and content of the present films. Further, the jury was admonished of the limitations of such evidence.

10. The trial court did not err in personally conducting the voir dire examination of the jury panel and in failing

to ask the 107 questions submitted by the appellants. It was discretionary with the court to conduct the examination so long as it elicited information from the prospective jurors necessary to reveal their qualifications and freedom from bias and to enable the parties to properly exercise the right of peremptory challenges and motions to challenge for cause.

On review, there has been found no lack of information about the prospective jurors that would tend to conceal possible prejudice on the part of the jurors or frustrate the proper exercise of challenges.

11. It is contended by the appellants that the Court erred in permitting the Commonwealth in its closing argument to refer to the corporate existence of the corporate defendants as sham. The question raised here is similar to the

appellants' motion to require the Commonwealth to elect to prosecute either the corporations as sham or otherwise. As legally organized and existing corporate entities, their responsibilities with reference to the offenses with which they were charged is dependant upon their guilt or innocence, based upon the action and knowledge of their corporate officers. This criteria did not change whether or not they were considered sham. It was, therefore, not error to permit prosecuting counsel to draw his own conclusions from the evidence in closing argument.

12. The trial judge was considered biased by the appellants, and they assign as error that he did not vacate the bench. He also personally referred to public records for corporate information. His reference to public records does not constitute error as obtaining evidence

outside the courtroom because he may take judicial notice of such records without such records having been produced in the courtroom. It has been previously found on appellate review that there is not sufficient indication of bias to require him to vacate the bench.

13. Pretrial records concerning the role of the three corporate appellants as to ownership of the real estate application for transfer of the license to operate a theater, and general business being conducted in the corporate names is interwoven to the extent that the corporate records became important to the issues. No undue hardship or prejudice has been shown in the subpoena dues tecum for said records.

14. Appellants moved for separate trials, which motion was denied. Where prejudice results to any defendant in

a joint trial of co-defendants a severance is imparative; but in this case there is seen no serious conflict of interests either between the corporate defendants or between the individual and the corporations. Although appellants claim all defendants were prejudiced by a joint trial, it is not apparent.

15. It was not error to quash the summons issued for the testimony of the judge who issued the search warrant. The issuing judge saw the films in person and did not have to rely on the affidavit of the officer, who had seen the films on the day previous to the day they were viewed by the judge and again were seen by the officer at the same time they were viewed by the judge. The judge as an impartial magistrate could determine probable cause concerning the nature of the films themselves without reference to

the affidavit of the officer as to the nature of the material.

16. The court was not in error in failing to dismiss the action on the basis of selective and discriminatory prosecution. A general statement by the appellants that there are others in Campbell County and in other parts of the state exhibiting similar material and have not been prosecuted is not a sufficient charge to indicate a purposeful or discriminatory prosecution of these defendants. Appellants have not met the burden to claim this as a valid defense as defined in U.S. vs. Berries, 501 Fed. 2d 1207, cited in appellants' statement of appeal.

JUDGMENT

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Judgment of the Trial Court be affirmed.

/s/ Thomas F. Schmarr
JUDGE

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The pertinent provisions of the First Amendment are:

> "Congress shall make no law . . . abridging the freedom of speech, or the press . . ."

2. The pertinent provisions of the Fifth Amendment are:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

3. The pertinent provisions of the Fourteenth Amendment are:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

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No. 83-1551

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

BROWN BEAR, INC.,
COMBINED ENTERTAINMENT VENTURES, LTD.,
HAPPY DAY, INC. and
TOM HOLLIS, JR., - - - - - - Petitioners,

versus

COMMONWEALTH OF KENTUCKY, - Respondent.

Brief in Opposition to Petition for Writ of Certiorari from the Supreme Court of Kentucky

BRIEF FOR RESPONDENT

WILLIAM J. WEHR
JUSTIN D. VERST
Assistant Campbell County Attorneys
and
Special Assistant Attorney Generals
331 York Street
Newport, Kentucky 41071
Telephone: (606) 491-5843
Attorneys for Respondent, Commonwealth of Kentucky

WESTERFIELD-SONTE CO., 619 W. KENTUCKY—P.O. BOX 2251, LOUISVILLE, KY.

QUESTIONS PRESENTED

1. Was the Petition for Certiorari timely filed?
2. Should Certiorari be denied when none of the considerations governing review are present?
3. Constitutionality of the Commonwealth of Kentucky obscenity statute, KRS 531.010, *et seq.*, as written and applied.
4. Constitutionality of the Commonwealth of Kentucky criminal facilitation of obscenity statute, KRS 506.080, *et seq.*, as written and applied.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-1551

BROWN BEAR, INC.,
COMBINED ENTERTAINMENT VENTURES, LTD.,
HAPPY DAY, INC. and
TOM HOLLIS, JR., - - - - - *Petitioners,*

v.

COMMONWEALTH OF KENTUCKY, - - *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT

The Respondent respectfully prays that the Petitioners' Petition for a Writ of Certiorari be denied.

OPINION BELOW; JURISDICTION; CONSTITUTIONAL AND STATUTORY PROVISIONS

Pursuant to Rule 34.2 of the Supreme Court of the United States, the subject areas referred to above, with appendixes, have been presented by the Petitioners to the satisfaction of the Respondent. Furthermore, all parties to the proceedings in the Kentucky Courts are listed in the caption.

STATEMENT OF THE CASE

Again, pursuant to Rule 34.2, the Respondent takes issue with only the portions of Petitioners' statement of the case as to be addressed herein.

The two films in question did not have titles but were identified at trial as "Detective Movie" and "Antique Shop Movie." The trial itself was to a jury, not the Court, and the jury's recommendation as to sentence was followed by the Court. Before discretionary review was sought in the Kentucky Court of Appeals and Kentucky Supreme Court, an extensive review as a matter of right was done by the Campbell Circuit Court. The conviction and sentence were affirmed.

REASONS FOR DENYING WRIT

I.

The Petition for Certiorari Was Not Timely Filed.

Rule 20 of the U. S. Supreme Court required this petition to be filed within sixty (60) days after the entry of judgment. The Kentucky Supreme Court entered its final judgment on December 15, 1983, and this petition was not filed until on or about March 15, 1984. No extension was applied for nor any good cause shown for this flagrant delay.

II.

None of the Considerations Listed in Rule 17 Are Applicable in the Case at Bar.

Rule 17 of the Rules of this Court indicates the character of reasons that will be considered in a petition for a writ of certiorari. Since the Kentucky Courts have accepted and followed the applicable federal law, as will be shown herein, the petition should be denied.

III.

The Commonwealth of Kentucky Obscenity Statute, KRS 531.010, *et seq.*, Is Constitutional as Written and Applied.

The Petitioners have raised various issues relating to the constitutionality of Kentucky Revised Statute 531.010, *et seq.* and Kentucky Revised Statute 506.080 as written and as interpreted and applied by the trial court.

In response to movants' arguments, the Kentucky pornography law, KRS 531.010, *et seq.* is not unconstitutional as written or applied in the case at hand nor does it fail to conform to the minimum standards set forth in *Miller* v. *California.* Kentucky's pornography law was specifically revised in 1974 to comply with the Supreme Court's mandate in *Miller* v. *California,* 415 U. S. 15 (1973).

Miller held:

> "The basic guidelines must be: (a) whether the average person applying contemporary community standards would find the work taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable law; and (c) whether the work, taken as a whole, lacks serious, literary, artistic, political, or scientific value." *Miller, supra,* 413 U. S. at p. 24. Under part (b) of the test, it is adequate if the statute, as written or as judicially construed, specifically defines the sexual conduct, depiction of which is forbidden. The court in *Miller* offered examples of what a state might constitu-

tionally choose to regulate: (1. patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.) (2. patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.) *Miller, supra,* 413 U. S. at 25.

KRS 531.010 (section 3) states:

> Obscene means:
>
> (a) to the average person applying contemporary community standards, the predominant appeal of the matter, taken as a whole, is to the prurient interest in sexual conduct, and
>
> (b) the matter depicts or described the sexual conduct in a patently offensive way; and
>
> (c) The matter, taken as a whole, lacks serious literary, artistic, political, or scientific value.
>
> (d) sexual conduct means acts of masturbation, homosexuality, lesbianism, beastiality, sexual intercourse, or deviant sexual intercourse, or physical contact with the genitals, flagellation, or excretion for the purpose of sexual stimulation or gratification.

Pursuant to the guidelines of the *Miller* case, it is not necessary to define geographical community and it is not necessary to define prurient interest. The only definition required by *Miller* is that of sexual conduct.

The Kentucky pornography law, KRS 531.010(4), complies with that requirement. *Miller* held that the "state at large" is a constitutionally adequate standard

as to a geographical community. The trial court properly ruled that the geographical community could and should be further limited to the geographical community of Campbell County, Kentucky. In the case of *Hambling* v. *United States,* 418 U. S. 87 (1974), in discussing the issue of geographical community, the court stated as follows:

> "The result of the *Miller* cases, therefore, as a matter of constitutional law and statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding which conclusion the average person, applying contemporary community standards would reach in any given case. Since this case was tried in the southern district of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that community upon which jurors would draw." *Hambling, supra,* at p. 101.

In the case at hand, in that the jurors who were to hear the case were by state law mandated to reside in the community of Campbell County, Kentucky, the trial court properly ruled that the geographical community whose standards were to be considered, was the community of Campbell County, Kentucky, where the jurors came from. Although argued by the Petitioners, the record does not include any reference to the population of Cincinnati, Ohio, nor of adjoining Kentucky counties.

Furthermore, it is not necessary to define the specific illegal acts that are prohibited under KRS 531.010, *et seq.* These acts are not of a technical nature, and, therefore, are understandable by a reasonable person without further defining them. See *Gateway Construction Co.* v. *Wallbaum,* 356 S. W. 2d 247 (1961). Certainly, a reasonable person with common intelligence can understand what it means to prepare, publish, print, exhibit, distribute and offer or possess with intent to distribute obscene material.

The application of the statute in question does not reach activities which are absolutely protected by the First and Fourteenth Amendments. Obscene material is unprotected by the First and Fourteenth Amendments pursuant to the *Miller* case. Therefore, the activities which fall under the Commonwealth's pornography laws, KRS 531.010, *et seq.,* are not protected by the First and Fourteenth Amendments based upon their being obscene. KRS 531.010 is in complete compliance with the Supreme Court guidelines and dictates as set out in the *Miller* case. There was, and is, no need for the courts of the Commonwealth of Kentucky to "authoritatively construe" Kentucky's obscenity law as suggested in the *Miller* case in that the Commonwealth's pornography law was specifically revised in 1974 to comply with the mandates of the *Miller* case. The authoritative construction suggested in the *Miller* case was merely an alternative to any actual revision of the state's pornography laws.

It is clear from the above that Kentucky law does not create an impermissible presumption, nor does it suggest that any description of sexual conduct is *per se* patently offensive. It is further clear that the Court's definition of prurient interest was authorized not only in *Miller* v. *California, supra,* but as early as *Roth* v. *United States,* 345 U. S. 476 (1957).

IV.

The Commonwealth of Kentucky Criminal Facilitation Statute, KRS 506.080, Is Constitutional as Written and Applied.

The Petitioners have made numerous and varied attacks upon KRS 531.020 and KRS 506.080 with particular reference to the issue of "knowledge" and the lack of the required knowledge by the Petitioners herein. Initially, it should be pointed out, that as to all the Petitioners, there was an abundance of proof through various sources and means as to the extensive intermingling and knowledge by all the Petitioners of the nature, content and character of the type of material that was being shown at the Cinema X Theatre. The court properly instructed the jury that "knowledge, content and character" means having general knowledge of the nature, content and character of the material. A person has such knowledge when he or she is aware that the film shows or depicts explicit sexual conduct whether or not such person has precise knowledge of the specific contents of the film. Such knowledge may be proven by direct or circumstantial evidence or both. *Hamblin* v. *United States,* 418 U. S.

87, 119-20 (1974); *United States* v. *Orioto*, 413 U. S. 139 (1973); *United States* v. *Thedia*, 484 F. 2d 1149, 1153 (5th Cir. 1973); *United States* v. *Hill*, 500 F. 2d 733, 740 (5th Cir. 1974). Neither KRS 506.080 nor KRS 531.020 are vague or uncertain and both statutes are sufficiently specific in their language to apprise the public, including these Petitioners, as to what conduct is prohibited.

It would be an absurd result if defendants such as the within Petitioners could escape prosecution and responsibility for the distribution of, or facilitating the distribution of, obscene matter unless it was shown that they had seen the specific films in question. Furthermore, three of the four defendants herein were corporations. The type and amount of scienter argued for by the Petitioners would allow for such an absurd result. The facilitation statute in question is not vague and does conform with the Federal Court guidelines as to scienter.

CONCLUSION

As found by the jury in the case at bar, the films identified as "Detective Movie" and "Antique Shop Movie" are obscene. They do constitute hard core sexual material. As such, they have no constitutional protection under the First and Fourteenth Amendments of the United States Constitution. The convictions should be affirmed.

Wherefore, the Commonwealth of Kentucky respectfully submits that all the proceedings of the trial court

were proper and without error, that the Kentucky Court of Appeals and the Kentucky Supreme Court properly denied discretionary review, that there are no special or extraordinary reasons for the U. S. Supreme Court to grant discretionary review, and that, therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM J. WEHR
Assistant Campbell County Attorney and Special Assistant Attorney General

JUSTIN D. VERST
Assistant Campbell County Attorney and Special Assistant Attorney General
331 York Street
Newport, Kentucky 41071
Telephone: (606) 491-5843

Attorneys for Respondent, Commonwealth of Kentucky

CERTIFICATION

I hereby certify that I have, this 5th day of April, 1984, mailed two (2) copies of the foregoing Brief for the Respondent to:

Honorable Robert E. Smith
Suite 1230
16133 Ventura Blvd.
Encino, California 91436

and

Honorable Mott V. Plummer
305 Campbell Towers
Newport, Kentucky 41071

Justin Vest
Assistant Attorney General